Residential
Tenancy
Commission

Residential Tenancy
Commission

Summaries of Significant Decisions

1984 5 R.T.C.

85-4615/

RESIDENTIAL TENANCY COMMISSION

SUMMARIES OF SIGNIFICANT DECISIONS - VOLUME 5

CITED (1984), 5 R.T.C.

This volume contains summaries of significant decisions and reasons given. If reference to the original full order and reasons is desired, contact the Head Office of the Residential Tenancy Commission at 77 Bloor Street West, Toronto, Ontario.

Published pursuant to the Residential Tenancies Act, R.S.O. 1980, c. 452, s. 81

Copies may be purchased:

- in person for $3.00 at the Ontario Government Bookstore, 880 Bay Street, Toronto
- by phone using Master Card or Visa - 965-6015 in the Metro Toronto dialing area, O-Zenith 67200 in Area Code 807 for toll-free service, 1-800-268-7540 for toll-free service in all other areas of Ontario
- by mail through Publications Services Mail Order, 880 Bay Street, 5th Floor, Toronto, M7A 1N8. A cheque or money order payable to the Treasurer of Ontario must accompany the order.

This represents the fifth in a series of volumes of Summaries of Significant Decisions of the Commission. Cases selected for publication include decisions made by individual Commissioners at initial hearings, as well as decisions made by Appeal Panels of the Commission at appeal hearings. Cases summarized herein are based on decisions made to June 30, 1984.

THE RESIDENTIAL TENANCY COMMISSION

CHIEF TENANCY COMMISSIONER AND CHAIRMAN OF THE BOARD: P.C. Williams

MEMBERS OF THE BOARD OF COMMISSIONERS:

W.D. Biggar
D.A. Dukelow
S.V. Fram
M.S. Green
G.E. Isaac
G.I. Mandel
E.J. Pollock
H.F. Snyder
J.H. Thomson

APPEAL COMMISSIONERS:

R.S. Bentley
W.D. Biggar
D.B. Braund
P.A. Browes
N.B. Doorenspleet
M.S. Green
D.L. Heller
G.E. Isaac
J.B. Jennings
L.C. LeDuc
D.C. MacDonald
G.I. Mandel
E.J. Pollock
K.S. Sagoo
A.D. Sandeman
H.F. Snyder
G.R. Tait
J.H. Thomson
L.V. Wilton
R.C. Yurkoski

COMMISSIONERS:

R.B. Allen
D.J. Burnside
G.R. Caverson
A.J. Durbacz
S.J. Gillespie
G.P. Goodrow
C.E. Harrott
R.T. Heine
H.M. Little
P.A. Loftus
W.R. McCormick
K.P. McGuinness
J.J. Menard
K.J. Metzger
D.H. Niblock
L. Petricone
L.W. Preston
D.J. Richardson
D.M. Ross
E.T. Smith
D.R. Snider
C. Sokulsky
J.L. Sprague
N. Stanwick
R.H. TenBroeck
K.J. Timney
K.W. Wronecki

SENIOR LEGAL COUNSEL: A.A. Hermant, Q.C.

77 Bloor Street West
Toronto, Ontario
M5S 1M2

Summaries of Decisions
Volume 5

TABLE OF CONTENTS

	Page
Re 120 Shelborne Avenue, North York File Number 126-736-NY	
Accounting Periods - use of historic cost approach	1
Re Apartment #4, 890 Byron Avenue, Ottawa File Number A-2603	
Base Rent - bonus given by landlord	2
Re Apartment #3, 2856 Keele Street, North York File Number 129-675-NY	
Base Rents - notionalized increases where landlord had not increased rent for several years	3
Re 9 Humewood Drive, Toronto File Number 126-1064-ET	
Base Rents - renovations, similar rents	5
Re 2 Glenhaven Street, Toronto File Number A-2914	
Capital Cost - interest on landlord's labour	6
Re Somerset Towers, 2045-2055 Carling Avenue, Ottawa File Number 126-591-OT	
Capital Costs - Major expenditure after purchase	36
Re 1436, 1440, 1442, 1444, 1446, 1450, 1454, 1458, 1460, 1462, 1466, 1470, 1472, 1476, 1482, 1484, 1488, 1492, 1494 Avenue Road, Toronto File Number 126-962-NY	
Condition attached to dismissal	8

Page

Re 41 Garfella Drive, Etobicoke
File Number 126-1050-ET

Cost Correction - guideline RR-17 applied 9

Re 135 Cartier Street, 87 Delaware Street, Ottawa
File Number 126-429-OT

Cost Correction - exercise of discretion 10

Re 1 Prospect Street South, Hamilton
File Number 126-1297-HM

Cost Correction - no reasons issued with previous order 12

Re Unit 206, 4001 Don Mills Road, North York
File Number A-2130

Exemption - application of section 134(1)(C) to condominium units 13

Re 218 Petrie Lane, Kanata
File Number 126-494-OT

Exemption - interim occupancy of condominiums 14

Re 519 St. Charles Street, Belle River
File Number 126-064-WN

Exemption - option to purchase clause 16

Re 156 Birch Crescent, Terrace Bay
File Number A-2213

Exemption - section 134(1)(A) Residential Tenancies Act 17

Re 20-42 Macklin Street North, Hamilton
File Number 126-1307-HM

Exemption - whole building renovations under section 134(1)(C) 19

	Page
Re 525 Wentworth Avenue, Ottawa File Number 126-311-OT	
Filing Requirements - failure to comply with section 126(4)	21
Re 2 Glenhaven Street, Toronto File Number A-2914	
Financial Loss - calculation under R.C.F.C.R.A.	6
Re 40 Gerrard Street East, Toronto File Number 126-276-TO	
Financing Costs - balloon payments	22
Re Nursewood House, 2 Nursewood Road, Toronto File Number 126-841-TO	
Financing Costs - bona fides of sale	24
Re 450 Byron Avenue, Ottawa File Number 126-465-OT	
Financing Costs - bridge financing capitalized	27
Re 89-91 Charlotte Street, Ottawa File Number A-2685	
Financing Costs - date at which allowable principal should be calculated	28
Re The Granada, 145 Kemp Crescent, Stratford File Number 126-641-LN	
Financing Costs - exercise of discretion to net down	30
Re 330 Chapel Street, Ottawa File Number 126-OT	
Financing Costs - increase in principal	31

Page

Re 225 Melvin Avenue, Hamilton
File Number 126-1243-HM

Financing Costs - large principal payments fluctuating interest rate 32

Re 701 Don Mills Road, Don Mills
File Number A-3189

Financing Costs - loan to subsidiary from parent company 34

Re Somerset Towers, 2045-2055 Carling Avenue, Ottawa
File Number 126-591-OT

Financing Costs - mortgage due for renewal at time of sale 36

Re 450 Daly Avenue, Ottawa
File Number 126-543-OT

Financing Costs - mortgage renewal, co-owner loans 37

Re Centerpoint - 101-201 Sherbourne Street, Toronto
File Number 126-261-TO

Financing Costs - participation clause 39

Re 215-221 Gladstone Avenue, Ottawa
File Number A-2611

Guidelines - effective date of amendment after date of application 40

Re Louise Apartments, 118 Vaughan Road, Toronto
File Number 126-903-ET

Jurisdiction - rent decrease justified 42

Re 51 Powell Avenue, South Porcupine
File Number 126-513-TM

Justified increase - application to newly rented unit 56

Page

Re Summit Apartments, 1170 Ramsey View Court, Sudbury
File Number 126-707-SD

Justified increase - whether based on increase in costs or total costs 44

Re 1465 Lawrence Avenue West, North York
File Number 126-787-NY

Loss of service - supplier now charging landlord for service that was previously free 45

Re Wedgewood Place, 6061 Yonge Street, Willowdale
File Number A-3072

Notice of Rent Increase - effect of section 5 of R.C.F.C.R.A. 47

Re Southwest One, 577, 584, 597, 607 Cranbrook Road, London
File Number 126-655-LN

Operating Costs - apportioning between exempt and non-exempt 57

Re Catalyst Gates, 399 Markham Road, Scarborough
File Number 126-280-SB

Operating Costs - court appointed receiver's fees 48

Re 60 Ruddington Drive, North York
File Number 126-849-NY

Operating Costs - cycles of high then low costs 50

Re 135 Cartier Street, 87 Delaware Street, Ottawa
File Number 126-429-OT

Operating Costs - rent review costs disallowed 10

Re 156 Bolton Street, Ottawa
File Number 126-429-OT

Procedure - section 126 application filed to obtain a ruling on a section 128 exemption 51

Page

Re 1430 King Street West, Toronto
File Number 126-376-TO

Procedure - interpretation of "not later than 14 days" 52

Re Apartment 6, 114 Glebe Street, Ottawa
File Number A-2677

Renovations - interpretation of section 128 53

Re 1320 Mary Street North, Oshawa
File Number 126-539-PB

R.C.F.C.R.A. - interpretation of the word "made" in section 2 54

Re 51 Powell Avenue, South Procupine
File Number 126-513-TM

Revenue - deemed rent on landlord occupied unit 56

Re Southwest One, 577, 587, 597, 607 Cranbrook Road, London
File Number 126-655-LN

Revenue, Costs - apportioning between exempt and non-exempt 57

Re Willroy Apartments, Blocks 2 and 3, Manitouwadge
File Number 126-246-TB-83/84

Revenue - vacancies caused by eviction 58

Re Townhouse 110, 740 Kennedy Road, Scarborough
File Number A-2642

Separate Charge - new service 60

Re 20-42 Macklin Street North, Hamilton
File Number 126-1307-HM

Standard of Maintenance - application of section 131(1)(C) 19

Page

Re Woborn Village, 2055 Ellesmere Road,
255 and 155 Dolly Varten Boulevard,
550 Brimorton Drive, Scarborough
File Number 126-347-SB

Standard of Maintenance - missing appliances in some units, section 5(a) R.C.F.C.R.A. 61

Re 820 Maitland Avenue, Ottawa
File Number 126-473-OT

Whole Building Review - whether semi-detached houses are separate residential complexes 62

Re 140 Carlton Street, Toronto
File Number 126-461-TO

Withdrawal of Application - considerations 64

IN THE MATTER OF: 120 Shelborne Avenue
North York, Ontario

AND IN THE MATTER OF an application for rent review by the landlord, Belmont Property Management

COMMISSIONER: David J. Burnside

DATE: February 28, 1984

FILE NUMBER: 126-736-NY

ISSUES: Accounting Periods - use of historic cost approach

The landlord applied under section 126 of the Residential Tenancies Act for whole building review. The accounting periods selected by the landlord were calendar year 1981 as Year 2, and calendar year 1982 as the projected year. The first effective date of the proposed rent increases was January 1, 1983.

Counsel for the tenants submitted that the accounting periods selected by the landlord were inappropriate. He felt that the landlord was attempting to use costs from previous years, when it was satisfied to take a 6% increase, to justify an increase in the projected year. Counsel for the tenants referred to the guide to the Cost Revenue Statment which states that the Year 1, 2 and projected year designations are set up to organize past and projected data. In his opinion, the projected year costs were to be based on projections, and therefore the accounting periods should be shifted forward so that the projected year is 1983.

The landlord's agent submitted that the landlord preferred to assess its rent increases on a historic basis, so that the increase in costs between the two previous years would be passed into the next year's rents. The agent pointed out that section 131(1)(a) of the Residential Tenancies Act refers to costs the landlord has experienced or will experience.

Commissioner Burnside requested that the landlord file the costs it had incurred in 1983, which he called the "projected year plus one". The costs were examined to determine whether the costs incurred in 1981 and 1982 were abnormally high, or were representative of the actual costs of operating the

complex. The Commissioner found that these costs were not extraordinary, and were representative of the actual costs.

Commisioner Burnside held that section 131(1)(a) permits the historic cost approach claimed by the landlord. He pointed out that the landlord's increases in the past were based on this approach and therefore the increase in costs in 1982 over 1981 had not yet been build into the rents. In these circumstances the Commissioner felt that it was reasonable to accept the accounting periods claimed by the landlord.

* * * * * * * * * * * * * *

IN THE MATTER OF:	Apartment #4 890 Byron Avenue Ottawa, Ontario
BETWEEN:	Victor F. McSheffrey (tenant) - and - Cyrand Investments Ltd. (landlord)
APPEAL PANEL:	M. S. Green, D. B. Braund, P. A. Browes
DATE:	December 21, 1983
FILE NUMBER:	A-2603
ISSUES:	Base Rent - bonus given by landlord

The landlord applied for rent review under section 126 of the Residential Tenancies Act, and an Order was subsequently issued by Commissioner Niblock. A tenant appealed this Order on the ground that he had added the justified increase to an incorrect base rent.

The lease submitted to the panel showed that the rent was the same as the amount submitted to Commissioner Niblock. However, the lease also provided that the tenant could pay a rent lower than the actual rent to satisfy the rent owing. The tenants argued that the rent actually charged, the lower bonus rent, should have been used as a base for calculating the new increased rents.

The representative for the landlord stated that the landlord had experienced difficulty renting particular units. To alleviate the problem, the landlord had decided to offer a lower bonus rent on those units. She submitted that all the tenants were aware that the legal rent that could have been charged for the unit was higher than what they were actually paying.

The panel held that Commissioner Niblock had correctly used the higher rent figure as the basis for his calculations. They noted that the landlord had made it clear to the tenants that the true rent was actually higher than the amount it was accepting from them. The panel felt that in this situation the tenants could not insist on the lower rent being used as a base for the calculation of rent increases.

The appeal was dismissed and the order of Commission Niblock affirmed.

* * * * * * * * * * * * * *

IN THE MATTER OF: Apartment 3
2856 Keele Street
North York, Ontario

BETWEEN: Evelyn Ambing and Chad Ambing (tenant)
- and -
Molly Bysice (landlord)

COMMISSIONER: David J. Burnside

DATE: November 25, 1983

FILE NUMBER: 129-675-NY

ISSUES: Base Rents - notionalized increases where landlord had not increased rent for several years.

The tenant applied for a rent rebate pursuant to section 129 of the Residential Tenancies Act.

At the hearing Commissioner Burnside found that the landlord had not taken a rent increase for several years. In October, 1982, the landlord had increased the rent by more than the statutory limit of 6%, without applying to the Commission for rent review.

At the hearing the landlord's solicitor argued that consideration should be given to the fact that the rents had not been raised for several years. He pointed out that the landlord was unaware of the rent review legislation and had taken the large increase to cover rapidly escalating costs. The landlord's solicitor submitted that the lawful rent should be calculated to include the rent increases the landlord could have taken.

Commissioner Burnside considered whether it would be fair and equitable to notionalize the 6% increases that were not taken by the landlord. The Commissioner carefully examined the rights and protections given to the landlord and tenant under the Residential Tenancies Act. He characterized the rights and protections given to a landlord as a sword, because they involved affirmative action on the landlord's part, such as bringing applications for rent review. He then characterized the tenants rights and protections as a shield, used as protection from the sword. The shield consists of the right to challenge rent increases under section 129, section 127 and at hearings on section 126 applications.

Commissioner Burnside emphasized that it was up to the landlord to use the sword, just as it was up to the tenant to use the shield. The Commissioner held that if the landlord does not pick up the sword and take a rent increase, or make a section 126 application, it is not up to the Commission to wield that sword for the landlord. He pointed out that if the Commission were to pick up the sword for the landlord, the tenants would be denied the protection of the shield, which allows them to dispute rent increases or terminate the tenancy.

After reviewing the above equitable considerations, Commissioner Burnside concluded that increases in rent not taken by the landlord should not be considered. In making the calculations for overpayment of the rents, the Commissioner considered the rents actually charged to the date of the increase and an additional 6% after that date. The landlord was ordered to repay to the tenant any monies taken in excess of the statutory rents.

The landlord appealed this decision to an appeal panel of the Residential Tenancy Commission. The appeal panel set aside the order of Commissioner Burnside, and a new order was issued on May 3, 1984. In their opinion, a better result would be achieved by following the approach suggested in Guideline RR-8. The rent overpayment was recalculated as the difference between the amount actually paid and the rent that could have been charged if the rent review legislation had been complied with.

* * * * * * * * * * * * * *

IN THE MATTER OF: 9 Humewood Drive
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Inaugural Investments Limited

COMMISSIONER: R. H. TenBroeck

DATE: March 30, 1984

FILE NUMBER: 126-1064-ET

ISSUES: Base Rents - renovations, similar units

The landlord brought an application for whole building review pursuant to section 126 of the Residential Tenancies Act.

At the hearing Commissioner TenBroeck found that renovations to many units in the building had significantly changed the character of those units. As a result, the landlord was entitled to set new rents under section 128 of the Act. It was found that the landlord had originally rented some of the renovated units for $650 to existing tenants and friends of tenants. The remaining renovated units were later rented for $700, a price the landlord felt more accurately reflected their true market value. Commissioner TenBroeck noted that the landlord did not carry out a unit by unit renovation cost assessment in setting the rent at $700.

The Commissioner referred to section 128 of the Residential Tenancies Act and Guideline RR-9, both of which state that when a new rent is set pursuant to section 128 it must be set at a level comparable to the average rent of similar units in the complex. After listening to the evidence and visiting the complex he concluded that the units in question were similar. Commissioner Burnside held that, based on both the Guideline and section 128, once the landlord had set a rent of $650 for some renovated units it could not charge more than $650 for other similar renovated units in the complex that were rented at a later date. In the result the base rent for the renovated units was set at $650.

One tenant has appealed this order. The decision or order of the appeal panel has not yet been issued.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 2 Glenhaven Street
Toronto, Ontario

AND IN THE MATTER OF an appeal by John Piotrl, landlord

APPEAL PANEL: E. J. Pollock, R. S. Bentley, J. B. Jennings

DATE: March 1, 1984

FILE NUMBER: A-2914

ISSUES: Capital Costs - interest on landlord's labour
Financial Loss - calculation under R.C.F.C.R.A.

The landlord applied for review of the rents under section 126 of the Residential Tenancies Act. The landlord appealed the order of Commissioner Cousins on several grounds. Firstly, the Commissioner wrongly held that the portion of the third mortgage relating to the landlord's labour should not bear interest. And secondly, the calculation of allowable financial loss was incorrect.

At the initial hearing Commissioner Cousins found that the landlord had financed capital expenditures out of his own funds. A third mortgage was eventually taken out to cover this cost, bearing interest at 14%. The mortgage included an allowance for the landlord's labour. The Commissioner held that interest should not be allowed on the cost of the landlord's labour, and adjusted the interest rate down to 10% accordingly. The landlord argued, on appeal, that the labour portion of the mortgage should bear interest at 14%.

The panel concurred with the landlord. In their view there was no justification for disallowing interest on the landlord's labour. Once a finding is made that a cost was incurred by the landlord's labour, it should be treated the same way as any other capital expenditure. If the labour had been performed by an outside contractor it would have attracted interest and therefore so should the landlord's labour. The panel recalculated the capital expenditure write-off at an interest rate of 14%.

On the second issue of appeal the landlord submitted that the Commissioner had incorrectly calculated the amount of financial loss to be awarded. Commissioner Cousins calculated that the only financial loss allowable under the Residential Complexes Financing Costs Restraint Act was 5% of the current rents.

The panel disagreed with this view because it failed to recognize that a part of the loss is not attributable to increased financing added at the time of purchase. The panel stated that part of the loss was due to normal operations and the landlord was entitled to a 100% pass-through of that operating loss. The Commissioner should have made a distinction between the loss due to financing existing prior to purchase, and loss due to new acquisition financing and cost correction. The panel recalculated the allowable cost based on this distinction. They allowed 100% of the loss due to operating costs and financing that existed prior to purchase, and the lesser of 5% of rents or 25% of the total loss as loss due to acquisition financing and cost correction.

After discussing several other unrelated issues, the panel set aside the order of Commissioner Cousins and issued a new order.

IN THE MATTER OF: 1436, 1440, 1442, 1444, 1446, 1450, 1454, 1458, 1460, 1462, 1466, 1470, 1472, 1476, 1482, 1484, 1488, 1492, 1494, Avenue Road
North York, Ontario

AND IN THE MATTER OF an application for rent review by the landlord, Affiliated Realty Corporation Limited

COMMISSIONER: David J. Burnside

DATE: April 17, 1984

FILE NUMBER: 126-962-NY

ISSUES: Condition attached to dismissal

The landlord brought an application for rent review under section 126 of the Residential Tenanices Act, and later requested permission to withdraw.

At the hearing the tenant's solicitor questioned the landlord's motives for withdrawal, as no reasons were given. She also pointed out that the landlord had failed to file sufficient information pursuant to section 126(4). The solicitor expressed the concern that if the application was dismissed, or consent to withdraw was given, the landlord would be able to file a new application for rent review at any time. She felt that this would amount to an abuse of process. The tenant's solicitor suggested that a condition should be attached to the withdrawal, or dismissal, that the landlord cannot take more than a 6% increase in the 12 months following the first effective date of rent increase.

Commissioner Burnside considered whether it would be fair to impose such a condition. He noted that under section 93(1) every decision shall be on the real merits and justice of the case, and furthermore section 110(3) allows the Commission to include any terms and conditions it considers fair in the circumstances. He refused to give consent for withdrawal as the landlord had offered no explanation, and he dismissed the application due to failure to file sufficient information under section 126(4). In these circumstances, Commissioner Burnside felt that it was fair to attach the condition that the landlord could not increase the rent more than 6% for 12 months after the first effective date.

An appeal by one tenant was dismissed and the order of Commissioner Burnside affirmed.

IN THE MATTER OF: 41 Garfella Drive
Etobicoke, Ontario

AND IN THE MATTER OF an application for rent review by 490352 Ontario Inc., (landlord)

COMMISSIONER: G. E. Isaac

DATE: January 11, 1984

FILE NUMBER: 126-1050-ET

ISSUES: Cost Correction - Guideline RR-17 applied

The landlord applied for rent review pursuant to section 126 of the Residential Tenancies Act. The building had been brought to rent review the year before.

Commissioner Isaac noted that at the previous review, operating costs for what is now Year 2 had been estimated. At the time of this hearing, the actual costs for that time period were available, so a comparison could be made of the estimated and actual costs incurred. The difference between the totals of the actual and estimated costs is the amount of the cost correction. Commissioner Isaac noted that expenditures had exceeded the cost estimates of the previous order so that the net result was an under allowance. The amount of the under allowance was added to the current justified rent increase and passed into the rents at this review.

An appeal by certain tenants was dismissed and the order of Commissioner Isaac affirmed.

IN THE MATTER OF: 135 Cartier Street
87 Delaware Street
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Vernon A. Smith (landlord)

COMMISSIONER: James L. H. Sprague

DATE: January 16, 1984

FILE NUMBER: 126-429-OT

ISSUES: Operating Costs - rent review costs disallowed
Cost Correction - exercise of discretion

The landlord filed an application for rent review under section 126 of the Residential Tenancies Act.

The landlord was claiming legal fees arising out of his appeal of last year's order. Guideline RR-18 suggests that costs incurred by the landlord in retaining a consultant, and preparing and presenting the application for review should be passed into the rents as part of the justified increase. The Guideline considers these costs to be part of the allowable operating costs under section 131 of the Residential Tenancies Act.

Commissioner Sprague disagreed with the view stated in the Guideline. In his opinion, rent review costs are the equivalent of the costs of bringing a legal action. He emphasized that quasi-judicial tribunals have no inherent jurisdiction to award legal costs, therefore there must be an express grant of this power in the governing statute. There is no such express power given to the Commission under the Residential Tenancies Act. The Commissioner also held there was no implicit power to award rent review costs under section 131 of the Act. He referred to several statutes that govern other quasi-judicial tribunals: Compensation for Victims of Crime Act, R.S.O. 1980, c. 539; Workmen's Compensation Act, R.S.O. 1980,c. 539; Human Rights Code, 1981, S.O. 1981, c. 53. He noted that in none of these statutes have the broad

powers to award related costs been interpreted to include the costs of making an application to that body. Commissioner Sprague felt that if the Legislature had intended that the Commission have the power to award the costs of making the application, it would have been expressly stated in the statute.

In the alternative, Commissioner Sprague stated that if he was incorrect in his interpretation of section 131, he would decline to exercise his discretion to pass-through the costs because, in his opinion, it would be inequitable to allow them. He referred to Triassic Holdings Ltd. v. Muirhead et al. (1983), 40 O.R. (2d) 651, in which the Divisional Court ruled that the Commission was under no obligation to pass-through all costs submitted by the landlord.

In his opinion, an allowance for rent review costs incurred by the landlord would be inequitable because there is no parallel provision for tenants to recover their costs. Commissioner Sprague was concerned that tenants might be discouraged from participating if the landlord's costs were built into the rent, since their participation may increase those costs. He concluded that it would be against public policy to uphold an interpretation of the Act that discourages the exercise of the right of participation, by the parties, granted under the Act.

Commissioner Sprague also considered whether a cost correction should be carried out. He referred to Guideline RR-17 which suggests that cost correction should be used to achieve retroactively the result that would have been reached if the actual costs had been available to the prior commissioner(s). Commissioner Sprague disagreed with the Guideline. He pointed out that the Triassic case held that the Commissioner exercises a broad discretion in passing through costs. In Commissioner Sprague's opinion, it was impossible for a subsequent commissioner to determine how the previous commissioner(s) would have exercised the discretion to accept, decline or vary the costs, when there was no obligation to accept and pass-through any costs.

In the result Commissioner Sprague made no allowance for rent review costs or cost correction in determining the justified rent increase.

This order has been appealed to an appeal panel of the Commission. No decision or order has been issued as of August 1, 1984.

IN THE MATTER OF: 1 Prospect Street, South
Hamilton, Ontario

AND IN THE MATTER OF an application for whole building review by Kazimierz and Helen Dudzinski, landlord

COMMISSIONER: Kevin McGuinness

DATE: July 29, 1983

FILE NUMBER: 126-1297-HM

ISSUES: Cost Correction - no reasons issued with previous order

The landlord brought an application for whole building review pursuant to section 126 of the Residential Tenancies Act.

At the hearing there was considerable discussion as to whether a cost correction should be carried out because no reasons were issued with the previous year's order. Guideline RR-17 suggests that where insufficient reasons are given, a cost correction may still be applied and the Commissioner may be required to refer to the worksheets of the previous Commissioner.

Commissioner McGuinness disagreed with the Guideline. He stated that since the Commission is a quasi-judicial body it can only act on the basis of the evidence before it. In his opinion, the worksheets of Commissioners are not evidence. Nothing requires that the order be based on the worksheets, nor is there any reason to believe that it would be based on the worksheets. The worksheets and rough notes often show several approaches that were considered by the Commissioner, and it is usually unclear which approach was actually taken.

Commissioner McGuinness held that the worksheets are not part of the record as defined by section 20 of the Statutory Powers Procedure Act (S.P.P.A.). Furthermore, the Commissioner felt that the worksheets are not

part of the reasons given by the Commissioner, partially because they are retained by the Commissioner. In his opinion, where no reasons are given the order must stand alone; a subsequent Commissioner cannot issue reasons on the previous Commissioner's behalf. Commissioner McGuinness held that by consulting worksheets one is creating reasons for the previous order.

In summation Commissioner McGuinness pointed out that reasons may be requested by the parties under section 17 of the S.P.P.A. In this case since there were no reasons given, no reasons requested, and no evidence, no cost correction could be made.

• • • • • • • • • • • • • • •

IN THE MATTER OF: Unit 206
4001 Don Mills Road
North York, Ontario

AND IN THE MATTER OF an appeal by Otilia Vaz, tenant

APPEAL PANEL: G. I. Mandel, N. L. Myrhorod, J. H. Thomson

DATE OF DECISION: July 13, 1983

FILE NUMBER: A-2130

ISSUES: Exemption - application of section 134(1)(e) to condominum units

The landlord applied under section 126 of the Residential Tenancies Act for rent review of unit 206. Commissioner Richardson dismissed the application because she found the unit was exempt under section 134(1)(e). The tenant appealed on the ground that unit 206 was not exempt from rent review.

The solicitor for the tenant argued that the condominium unit in question was in a building part of which was occupied as rental accommodation before January 1, 1976. He contended that the Commissioner had incorrectly interpreted "building" under section 134(1)(e) to mean the individual

condominum unit. He argued that "building" means the whole building of which the condominium unit is just one part. The solicitor referred to section 1(l)(e) of the Condominium Act which defines building as included in property and property to mean interests appurtenant to the land.

The appeal panel noted that the definition under the Condominium Act was neither relevant nor helpful. The panel decided that the most appropriate way to interpret "building" would be to give it a meaning that is harmonious with the scheme and objects of the Act. The whole building review method set up by the Act means a landlord must bring all his or her units to rent review at one time. In the situation of a condominium complex the decision of one landlord to go to rent review has no effect on the other landlords in the building. To hold otherwise would be unfair since condominium units are owned separately and have different financing and operating costs. Therefore, the renting of one unit in a condominium complex should have no effect on the status of the other units.

The panel held that it was appropriate in the case of a condominium complex to interpret the word "building" to mean an individual unit, since this approach is more logical and harmonious with the intent of the Residential Tenancies Act.

The decision of Commissioner Richardson was affirmed.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 218 Petrie Lane
Kanata, Ontario

AND IN THE MATTER OF an application for rent review by Wayne Wood (landlord)

COMMISSIONER: James L. H. Sprague

DATE: September 9, 1983

FILE NUMBER: 126-494-OT

ISSUES: Exemption - interim occupancy of condominiums

This was an application for rent review by the landlord pursuant to section 126 of the Residential Tenancies Act.

The preliminary issue to be resolved was whether the subject condominium unit was occupied as a rental unit before January 1, 1976 and was therefore subject to rent review.

At the hearing Commissioner Sprague found that in September, 1975, the present tenant entered into an agreement of purchase and sale for the condominium in question. Pursuant to the agreement the tenant took interim occupancy of the unit in October, 1975. The tenant paid an interim occupancy fee until registration and closing in April, 1976. These fees were not credited to the purchase price, nor were they refundable should the deal not close. In June, 1981, the present tenant sold the unit to the landlord, who allowed the tenant to remain in possession as tenant.

It was the landlord's contention that the tenant had occupied the unit during the interim occupancy period as an owner and not as a tenant. He argued that the unit was exempt from rent review because it was not occupied as a rental unit prior to January 1, 1976.

Commissioner Sprague referred to section 1 of the Residential Tenancies Act which contains definitions of landlord, tenant, rent and rental units. He noted the broad jurisdiction of the Act is based on a right to occupy rather than the existence of a landlord and tenant relationship. The Commissioner pointed out that the tenant paid a monthly fee for the use and occupancy of the unit and that these fees did not apply against the purchase price. He held that the fees paid by the tenant to the vendor came within the definition of rents under the Residential Tenancies Act.

To strengthen his position the Commissioner referred to W. B. Sullivan Construction Ltd. v. Barker et. al., (1976) 14 O.R., (2d) 529, a decision of the Ontario Divisional Court. The Court held that a landlord and tenant relationship existed in the same fact situation as the present case. The only distinguishing factor was the terms used in the agreement. In W. B. Sullivan the agreement referred to tenants and monthly rental, here the terms used were licensee and interim occupancy fee. The Commissioner pointed out that

agreements are not interpreted on words alone, but on substance. In both cases the substance was the same and, therefore, a landlord and tenant relationship existed in the present case also.

Commissioner Sprague held that the interim occupancy fees constituted rents within section 1(l)(K) and that a landlord and tenant relationship existed. As a result the unit was not exempt and the Commissioner had jurisdiction to make findings and order a rent increase.

• • • • • • • • • • • • • • •

IN THE MATTER OF: 519 St. Charles Street
Belle River, Ontario

AND IN THE MATTER OF an appeal by the landlord, Pearl Parent Marshall

APPEAL PANEL: K. S. Sagoo, E. J.Pollock, L. V. Wilton

DATE OF DECISION: June 8, 1984

FILE NUMBER: 126-064-WN

ISSUES: Exemption - option to purchase clause

The tenant applied under section 129 of the Residential Tenancies Act for repayment of excess rent paid to the landlord. Commissioner MacDonald ordered the landlord to repay $3,000 in illegal rents to the tenant. The landlord appealed on the ground that the premises were exempt from rent control because they were the subject of an agreement for purchase and sale. It was argued that monies received were payments toward the purchase price and not rent.

The subject property had been rented as a residential premises for 28 years. After the last tenant left the landlords decided to renovate the house and sell it. An agreement was reached wherein the applicant-tenants were to occupy the house and would later purchase it. At the initial hearing Commissioner MacDonald held that the actual agreement entered into was a lease with an option to purchase.

The agent for the landlord based his argument on the intention of the parties. He argued that both parties understood the agreement to be one of purchase and sale.

The tenant did not deny that there was an intention to eventually purchase the property. His major contention was that the agreement was a tenancy agreement with an option to purchase that was never exercised.

The appeal panel upheld the finding of Commissioner MacDonald that the agreement was a tenancy agreement with the inclusion of an option to purchase clause. The panel held that the mere inclusion of such a clause does not create an agreement of purchase and sale until the option is exercised, regardless of the intention of the parties.

The appeal panel affirmed the decision of Commissioner MacDonald.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 156 Birch Crescent
Terrace Bay, Ontario

BETWEEN: L. W. Fraser - Tenant

- and -

Lake Superior Board of Education - Landlord

AND IN THE MATTER OF an appeal by the tenant, L. W. Fraser, from the order of G. R. Tait

APPEAL PANEL: M. S. Green, J. B. Jennings, G. L Mandel

DATE OF DECISION: August 29, 1983

FILE NUMBER: A-2213

ISSUES: Exemption: section 134(1)(a)
Residential Tenancies Act

The tenant appealed from a decision of Commissioner Tait that held that the local Board of Education is an agent of the provincial government and is therefore exempt under section 134(1)(a) from Part XI of the Residential Tenancies Act. The residential property in question is owned by the Lake Superior Board of Education.

The tenant argued that the Board of Education is a democratically elected government responsible to the local electorate and therefore cannot be considered an agency of the provincial government. He contended that although it receives funding from the province, the Board has the power to raise funds by taxation and is therefore autonomous.

Counsel for the landlord argued that the Board is not an autonomous body but an agency of the Ministry of Education. It is controlled by the Ministry through the Education Act. He pointed out the power the Ministry has under the Education Act to control the curriculum and to grant or cancel teacher's certificates of qualification.

Counsel for the landlord then referred the panel to the definition of agent in the Canadian Encyclopedia Digest (Ontario), 3rd.edition, volume 1. It states that

> "...An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in this exercise to the direct control or supervision of the principal."

He submitted that this definition clearly describes the relationship between the Board and the Ministry.

The appeal panel found that the Board is not an autonomous body but must work within the guidelines and framework of the Education Act. Although many powers have been delegated to the Board of Education the authority and control rests with the Ministry of Education as evidenced by its control over the curriculum and certification of teachers. The Ministry has retained the real power of decision while the Board administers those decisions. It was held by the panel that these facts clearly show that an agency relationship exists between the landlord and the Ministry of Education, and that therefore the complex in question is exempt from rent review.

The order of Commissioner Tait was affirmed by the appeal panel.

IN THE MATTER OF: 20-42 Macklin Street North
Hamilton, Ontario

AND IN THE MATTER OF an application for rent review by Dilton Construction (landlord)

COMMISSIONER: Kevin McGuinness

DATE: October 3, 1983

FILE NUMBER: 126-1307-HM

ISSUES: Exemption - whole building renovations under section 134(1)(c)

Standard of Maintenance - application of section 131(1)(c)

The landlord had filed an application for rent review pursuant to section 126 of the Residential Tenancies Act. A jurisdictional issue that had to be resolved at the hearing was whether the residential complex was exempt from rent review under section 134(1)(c) of the Act.

It was the landlord's position that a new building had been created due to the extensive renovations of the whole residential complex. Guideline RR-9 suggests that where a unit undergoes substantial renovations a new unit is effectively created and it becomes a unit that has not been rented in the previous 12 months. It was argued that if all the units are renovated, the building then falls within section 134(1)(c), since no part of it was occupied as a rental unit prior to January 1, 1978.

The counsel for the tenant disagreed with the landlord. She felt that section 134(1)(c) does not support the broad interpretation given to it by the landlord and Guideline RR-9. In the alternative, she argued that a new building had not been created since its essential character had not been changed. It was pointed out that in some units only minor repairs had been made.

Commissioner McGuinness stated that it would be unreasonable to suggest that renovations could not create a new building within section 134(1)(c).

However, to be eligible for the exemption, the landlord must show that all the units have been renovated so that no part of the building can be considered to have been occupied as rental accommodation prior to January 1, 1976. The Commissioner held that the landlord had failed to show that all of the units had been or would have been substantially changed. He concluded that the building did not fall within section 134(1)(c) and was therefore subject to rent review.

Commissioner McGuinness also considered the effect of the renovations on the standard of maintenance under section 131(1)(a) of the Residential Tenancies Act. He noted that while the Act requires the Commission to consider any change in the standard of maintenance, no guidance is given as to how this finding should affect the rent increase. Arguably, consideration is given to the standard of maintenance in the pass-through of operating costs and capital expenditures. The Commissioner noted that these section 131(1)(a) costs are entirely separate considerations from the standard of maintenance in section 131(1)(c).

Commissioner McGuinness noted that an increase in the standard of maintenance may justify a rent increase that exceeds the cost justification for that increase. In his opinion, section 131(1)(c) gives the Commission the power to ensure that pure cost considerations do not result in the conferring of an unjust benefit on the landlord or tenant. He noted that it is difficult to quantify benefits in terms of dollars. Commissioner McGuinness felt that where there had been a change in ownership, recognition of the standard of maintenance may be given by adjusting the spreading of financial loss. In this case it was the Commissioner's opinion that the financial loss should be spread over 3 years instead of 5 years in consideration of the increase in the standard of maintenance and repair.

One tenant appealed successfully on a minor and unrelated issue. In all other respects the order of Commissioner McGuinness was affirmed.

IN THE MATTER OF: 525 Wentworth Avenue
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Kazirize Holdings Ontario Ltd. (landlord)

COMMISSIONER: James L. H. Sprague

DATE OF DECISION: August 8, 1983

FILE NUMBER: 126-311-OT

ISSUES: Filing Requirements - failure to comply with secton 126(4)

The landlord brought an application for rent review pursuant to section 126 of the Residential Tenancies Act.

The landlord had filed a Cost Revenue Statement and supporting documentation. At the hearing it was found that the materials filed by the landlord were incomplete and totally disorganized. Commissioner Sprague noted that although the Cost Revenue Statement is not a regulated form which must be filed, the landlord must file documents that will make the parties aware of the issues. He held that the information filed by the landlord only served to confuse the issues and failed to clearly present the financial situation of the building under review. Furthermore, Commissioner Sprague held that the tenants should not to be expected to check the files of previous applications in order to attain a clear understanding of the matters in issue. It was his opinion that each application is a completely separate matter from any previous application, and therefore, it must be able to stand on its own. He held that the materials filed by the landlord had failed to fulfill any informational purpose.

The Commissioner stated that there were two possible courses of action available. He could order an adjournment, to allow the landlord the opportunity to organize and complete the documentation, or he could dismiss the application for failure to file sufficient materials under section 126(4) of the Residential Tenancies Act.

The tenant's position was that the application should be dismissed. The landlord's agent argued that there should be an adjournment because there

were extenuating circumstances that had prevented filing a proper and complete application. Two arguments made by the landlord's agent were that the landlord lived in British Columbia and was not aware of the requirements of the Ontario rent review legislation and that dismissal would exacerabate the financial problems the building was experiencing.

Commissioner Sprague did not accept the arguments made by the agent for the landlord. He pointed out that if a corporation operates in the Province of Ontario it is deemed to be aware of the laws of the province. Furthermore, financial hardship is not a relevant factor in considering an adjournment. The Commissioner held that the disorganized and incomplete materials filed were not explained by the deteriorating financial situation.

Commissioner Sprague noted that he had the discretion to extend the 14-day limitation period, in section 126(4), for filing materials. However, in his opinion, that discretion should only be exercised where there has been substantial compliance with section 126(4) or there are compelling reasons for the failure to comply. The landlord had failed to show that it had made an honest and bona fide attempt to comply with the statute.

Commissioner Sprague held that the applicaton should be dismissed due to failure to file sufficient materials under section 126(4).

• • • • • • • • • • • • • • •

IN THE MATTER OF: 40 Gerrard Street East
Toronto, Ontario

AND IN THE MATTER OF an appeal by the landlord - 475920 Ontario Limited

APPEAL PANEL: G. E. Isaac, E. J. Pollock, L. V. Wilton

DATE OF DECISION: March 1, 1984

FILE NUMBER: 126-276-TO

ISSUES: Financing Costs - balloon payments

The landlord, 475920 Ontario Limited, applied under section 126 of the Residential Tenancies Act for an order permitting an increase greater than 6%. The landlord then appealed from the order issued by Commissioner Browes stating, as one of the grounds of appeal, that the Commissioner should have allowed a balloon payment, required by the mortgage, as a legitimate financing cost.

Under the terms of the second mortgage the mortgagor was to make a $1,000,000 principal payment against a total principal of $6,340,000 one year after inception of the mortgage. Commissioner Browes declined to accept this as a legitimate financing cost because she considered it to be a delay in down payment, or an equity payment, applicable to the acquisition of the building.

The solicitor for the landlord argued before the appeal panel that there are many methods of payment that can be arranged under a mortgage. In his opinion the large principal payment required by this mortgage was merely a variation in the method of payment. He further pointed out that the mortgage was registered on title and that failure of the landlord to pay could result in a power of sale or other similar remedy.

After careful consideration the appeal panel held that the balloon payment was made in partial payment of the debt owing. However, they decided to treat the payment as a debt instrument separate from the mortgage. The panel created a notional mortgage of $1,000,000 at 19%, amortized over 15 years from the date of inception. Payments under this notional mortgage were then included with the financing costs.

After ruling on a number of unrelated issues, the panel set aside the order of Commissioner Browes and substituted a new order.

NOTE: This order has been appealed to the Divisional Court of Ontario by the tenants on a different ground.

IN THE MATTER OF: Nursewood House
2 Nursewood Road
Toronto, Ontario

AND IN THE MATTER OF an appeal by the landlord - Bryce Valley Holdings Limited

APPEAL PANEL: G. E. Isaac, R. S. Bentley, L. V. Wilton

DATE OF DECISION: December 29, 1983

FILE NUMBER: 126-841-TO

ISSUES: Financing Costs - bona fides of sale

The landlord company applied for rent review under section 126 of the Residential Tenancies Act. At the initial hearing Commissioner Goodrow disallowed the financing costs of a second mortgage because the facts failed to show that the increased financing costs were due to a bona fide sale of the building. The landlord appealed on several grounds, the major one being that there was in fact a bona fide sale and that therefore Commissioner Goodrow should have allowed the increased financing costs and concomitant loss.

The facts, as found by the appeal panel, are as follows: In 1964 two business associates, referred to as 'the principals', set up a corporation known as Nursewood House Limited in which they were the sole shareholders. This corporation's only asset was 2 Nursewood Road. These same two principals, in 1965, set up a second corporation, Bryce Valley Holdings Limited, as a vehicle for other activities they might engage in. In 1971 they transferred their holdings in Bryce Valley to two family trusts in which they were trustees and their children were beneficiares.

In 1981 the two principals decided, for taxation and other reasons, that 2 Nursewood Road should be sold. They preferred to keep the property in the family. After obtaining legal advice they decided to transfer all their shares in Nursewood House Limited to Bryce Valley Holdings Limited at a value established by an independent appraisal of the property. The funds were raised by the issuance of promissory notes, which were paid off several

months later, and by placing a second mortgage of $265,000 on the property. Neither mortgagee of the second mortgage was found to be related in any way to the principals. As of January 1, 1982, Nursewood House Limited and Bryce Valley Holdings Limited were amalgamated, with the two principals as directors of the company. The beneficial ownership of the share capital has remained with the two family trusts.

At the initial hearing Commissioner Goodrow disallowed the costs of the second mortgage because he found there was no bona fide sale.

Counsel for the landlord argued, before the appeal panel, that a bona fide sale had taken place. He stated that there are several well-recognized techniques available to someone wishing to acquire a business. One could acquire all of the shares of the corporation that controls the assets of the company, or amalgamate one's own corporation with the corporation whose assets one wishes to acquire. Bryce had used the first method and then proceeded to amalgamate with the acquired corporation. The landlord's counsel said the major purpose of the transaction was to minimize capital gains, while keeping the asset in the family. The potential effect on rent review was not an important consideration. He pointed out that the principals are not beneficial owners of Bryce Valley Holdings Limited, nor have they been since 1971. They are trustees, and as trustees they have fiduciary duties which are different from those of sole shareholders who act solely in their own interest.

The tenant's solicitor contended that there had been no change, except that the principals were able to extract $275,000 from the property. He argued there was no sale for rent review purposes, because there had been no change in the management and administration. The building remained within the family and the principals continued to make all the decisions.

The appeal panel found that the sale of shares to minimize estate and income taxes was a legitimate purpose. The evidence did not support the allegation by the tenants that rent review considerations were an important factor. They noted that the documents refer to a sale of shares and not the sale of a complex and held that while a business was acquired, it was not the stated purpose of the transactions.

The appeal panel further found that the functions carried out by the principals as trustees were identical to those they carried out when they acted in their own interest. There was no evidence to show that they were acting in a different manner than previously. The panel was not convinced that the amalgamation created a sale. It was noted that under the Business Corporations Act, amalgamating companies are not dissolved by amalgamation, but that the amalgamated corporation is a continuation of the amalgamating companies.

It was held that while a transaction had occurred, there had not been a bona fide sale of 2 Nursewood Road. The panel stated that Commissioner Goodrow had acted correctly in not allowing the additional financing costs under the second mortgage.

Commissioner Bentley dissented, stating that the financing costs of the second mortgage should be allowed. He felt that rent review legislation was not intended to stifle this series of transactions. If the financing costs were disallowed, the trust would be faced with a mounting loss. To fulfill their fiduciary duties, the principals would be forced to sell the property. Commissioner Bentley was concerned about the affect this series of events would have on the tenants. Balancing these two concerns, he felt it would be best for both the tenants and the owners to allow the financing costs of the second mortgage to be passed through.

The order of Commissioner Goodrow was set aside on other grounds and a new order was issued.

NOTE: The landlord has appealed to the Divisional Court of the Supreme Court of Ontario on the ground that a bona fide sale had taken place and therefore financing costs should have been allowed.

IN THE MATTER OF: 450 Byron Avenue
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Regina Allingham (landlord)

COMMISSIONER: Jacques J. Menard

DATE OF DECISION: November 25, 1983

FILE NUMBER: 126-465-OT

ISSUES: Financing Costs - bridge financing capitalized

The landlord brought an application under section 126 of the Residential Tenancies Act to raise the rents more than 6%.

The landlord had purchased the property at the beginning of Year 2. At that time she assumed the first mortgage at 12 1/2% and placed a second mortgage on the property at 16 1/2%. Halfway through Year 2 these two mortgages were discharged and replaced with one more favourable mortgage at 11 1/2%.

Commissioner Menard found that there were two costs associated with the change in financing. One was the cost of paying off the second mortgage before it matured. The other was the cost of carrying the higher financing until the new mortgage was in place, which the Commissioner calculated as the difference between what the landlord had actually paid and what she would have paid had the new financing been in place upon acquisition. The Commissioner recognized that landlords often incur these sorts of costs, when they purchase a property with unfavourable financing, in the hope of refinancing it on more favourable terms. He characterized these costs as a type of bridge financing, which he felt was a justified expense that should be passed-through into the rents. He noted that the tenants were receiving the benefits of the bridge financing in the form of lower financing costs and therefore lower rents.

Commissioner Menard held that these two costs should be capitalized, because they were one-time expenditures with lasting benefits. In the result the bridge financing was built into the new rent structure as a capital cost amortized over 10 years at 12%. To prevent double recovery, the Commissioner calculated the financing costs for Year 2 as if the new mortgage had been in place upon acquisition.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 89-91 Charlotte Street
Ottawa, Ontario

AND IN THE MATTER OF an appeal by the tenant Ms. K. J. Zissoff

APPEAL PANEL: G. I. Mandel, E. J. Pollock, P. A. Browes

DATE OF DECISION: March 19, 1984

FILE NUMBER: A-2685

ISSUES: Financing costs - date at which allowable principal should be calculated

This was an appeal by a tenant from the order of Commissioner Sprague issued pursuant to section 126 of the Residential Tenancies Act. One issue on appeal was whether financing costs should be calculated on the principal outstanding on the mortgage at the date of acquisition, or at the date of the inception of rent control legislation.

The panel found that the landlord had purchased the complex in his mother's name, in trust, in 1966. The price stated was $15,500. No evidence was presented respecting the amount of financing on the property at that time. The property was transferred to the landlord's name in 1972, and an arbitrary price of $60,000 was established. Subsequently, mortgages amounting to $50,500 had been taken out against the property. Commissioner Sprague held that the amount of principal outstanding at the inception of rent control should be considered. He found this to be $50,500, and he allowed financing costs on this amount.

The representative for the tenants argued that only financing that was needed to purchase the complex should be considered. Since the mortgage allowed by Commissioner Sprague was not in place at the time of purchase it should not have been accepted.

The majority of the appeal panel held that financing in place at the inception of rent control should be allowed. They stated that to interpret the Act as the tenant's representative had suggested would be to give the Act retroactive effect.

Commissioner Browes, dissenting, held that only financing in place at acquisition should be accepted. She pointed out that section 131(1)(a) of the Residential Tenancies Act does not say how far back the Commission should review principal amounts in calculating financial costs. She noted that section 131(2) talks about financing costs resulting from acquisition. In her opinion, to allow increases in principal between the purchase date and the inception of rent control would give landlords an opportunity to pass-through costs on financing that had no relation to the bulding. She held that her position was consistent with the Commission's policy of not allowing the financing costs on an increase in principal unless it was to the benefit of the building.

The panel set aside the order of Commissioner Sprague on different grounds, and issued a new order.

IN THE MATTER OF: The Granada
145 Kemp Crescent
Stratford, Ontario

AND IN THE MATTER OF an application for rent review by Berlin Construction Limited, c/o Doane Raymonde Limited, Receiver (landlord)

COMMISSIONER: P. A. Loftus

DATE OF DECISION: August 12, 1983

FILE NUMBER: 126-641-LN

ISSUES: Financing Costs - exercise of discretion to net down

The landlord filed an application under section 126 of the Residential Tenancies Act for whole building review.

This was the first time this building had been brought to rent review. At the hearing Commissioner Loftus made the finding that there would be a decrease in financing costs from Year 2 to the projected year.

It was the landlord's agent's contention that no consideration should be given to the decrease in financing costs as the landlord had never been to rent review before. In his interpretation of Guideline RR-2, a decrease in financing costs would only be considered where an allowance for increased financing costs was made at a previous hearing. Furthermore, he pointed out that the landlord was not making a claim for increased financing costs.

Commissioner Loftus disagreed with the landlord's agent. He pointed out that although the landlord was not claiming increased financing costs it was claiming a financial loss which requires a consideration of the Year 2 financing costs and is therefore related to the projected year. He noted that an increase or decrease in financing must be considered in carrying out a

relief of hardship calculation. The Commissioner felt that this was an appropriate situation to net down in view of the fact that financing costs are a necessary consideration in several calculations used to arrive at a justified increase.

An order for a rent increase was issued which included an allowance for the decrease in financing costs.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 330 Chapel Street
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Nator Real Estate Ltd. (landlord)

COMMISSIONER: Jacques J. Menard

DATE OF DECISION: April 12, 1984

FILE NUMBER: 126-OT

ISSUES: Financing Costs - increase in principal

The landlord applied to increase the rents more than 6% under section 126 of the Residential Tenancies Act.

At the hearing the landlord requested that financing costs be allowed on the increased principal amount of the mortgage, even though there had been no re-investment in the building.

Commissioner Menard found that the landlord's mortgage was held in Swiss Francs from 1976 until 1983. Under this arrangement the landlord was able to obtain a much more favourable interest rate on the mortgage, than what it would have obtained in Canada. The change in the exchange situation forced the landlord to reconvert the funds. When the mortgage was transferred into Canadian dollars the exchange rate had eroded the value of the first mortgage so that the principal increased to $770,000 from $500,000.

Commissioner Menard noted, at the hearing, that Guideline RR-4 suggests that the cost of increased principal should only be allowed if the additional funds were re-invested in the building. He noted that while the guidelines are of persuasive value, they need not be followed in order to properly address a given fact situation on its real merits. The policy behind the guideline is to ensure that if tenants are paying for increased financing, they are also receiving the benefit. The Commissioner held that the benefit the tenants received was in the form of lower rent increases, because they were protected from the vagaries of the Canadian mortgage market. He felt it would be inequitable not to pass the real cost of these financing arrangements on to the tenants, after they had enjoyed the benefits for several years.

In the result the full financing costs of the $770,000 principal were passed through as part of the justified rent increase.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 225 Melvin Avenue
Hamilton, Ontario

AND IN THE MATTER OF an application for rent review by J. Martin Properties (landlord)

COMMISSIONER: Kevin McGuinness

DATE: June 30, 1983

FILE NUMBER: 126-1243-HM

ISSUES: Financing Costs - large principal payment
- fluctuating interest rate

The landlord filed an application for whole building review under section 126 of the Residential Tenancies Act.

In considering this application, Commissioner McGuinness made the finding that the mortgage on the residential complex expired at the end of Year 2 and had an interest rate of 12 3/4%. Upon renogotiation of the mortgage at 19 1/2%, for one year, the landlord reduced the principal owing by $70,000. It

was found that when this new mortgage expired at the end of the projected year, it could be renewed at an interest rate of 12 3/4%. There were two issues to be considered: how to treat the principal payment of $70,000; and how to pass-through the increase in interest costs.

In considering the principal paydown, Commissioner McGuinness noted that the tenants were entitled to the benefit where the landlord's financing costs are retired in the ordinary course of paying off the mortgage, because the rents have contributed to the payment. In this case the landlord had made the payment out of its own funds, the tenants had not contributed. In the Commissioner's opinion if an allowance were given in the justified rent increase for the decrease in financing costs, because of the pay down in principal, a windfall benefit would be conferred upon the tenants. Commissioner McGuinness held that it would be equitable to ignore the principal payment and to calculate the financing costs on the mortgage as if the principal payment had not been made.

Commissioner McGuinness then considered the increase in the interest rate due to renewal of the mortgage. He pointed out that when the mortgage was renewed at the end of the projected year the interest rate would be approximately the same as it was on the original mortgage. The Commissioner recognized that changes in costs beyond the projected year should not ordinarily be considered on the present application. However, in his opinion, it would be unrealistic to ignore the substantial decrease in the interest rate that will have occurred at the end of the projected year. He felt that if that increased financing cost were built into the rents, a windfall benefit would be conferred upon the landlord. In the result, Commissioner McGuinness did not make allowance for the increased interest costs in calculating the justified increase because it would not reflect the real costs of financing.

Commissioner McGuinness concluded that it would be equally unfair to give the benefit of the principal payment to the tenants, as it would be to pass-through the increase in interest rate in the rents. In his opinion, the approach taken was equally fair to both the landlord and the tenant.

IN THE MATTER OF: 701 Don Mills Road
Don Mills, Ontario

AND IN THE MATTER OF an appeal by the landlord, Mount Citadel Limited

APPEAL PANEL: J. H. Thomson, R. S. Bentley, K. S. Sagoo

DATE OF DECISION: April 26, 1984

FILE NUMBER: A-3189

ISSUES: Financing costs - loan to subsiduary from parent company

This was an appeal by the landlord from the order of Commissioner Browes issued under section 126 of the Residential Tenancies Act. The landlord appealed on the ground that the costs of secondary financing were incorrectly disallowed.

The facts, greatly simplified, as found by the panel are as follows. The landlord company is a wholly owned subsiduary of a Swiss Company. The landlord had entered into a lease agreement with the former owners of 701 Don Mills Road in which it would lease the property under review from the former owners. The lease contained an irrevokable option to purchase the property at a future date. One of the terms of the agreement was that the landlord was to assume the first and second mortgages upon purchase. Partly in consideration of the lease, and before the option to purchase was exercised, the landlord arranged a second mortgage of $1,350,000 for the former owners with its parent company in Switzerland. Before it exercised the option to purchase the landlord bought the second mortgage from its parent company. The funds were raised by the issuance of a debenture for $903,000, part of which was used against the second mortgage, and the issuance of preference shares. Upon purchase the landlord assumed the first mortgage and paid the balance owing in cash, the second mortgage already being owned by the landlord.

The landlord's agent conceded that the issuance of the preference shares was a capital transaction and was not the assumption of a debt. The issue on appeal was whether the financing costs of the debenture constituted a legitimate debt financing cost or, a removal of equity from the building.

At the initial hearing Commissioner Browes made the finding that the discharge of the second mortgage represented equity. She disallowed the financing cost of the promissory note used to pay off the second mortgage because it was therefore equity financing.

The landlord's position was that the landlord and the second mortgagee were two, separate identities. He analogized the facts to a situation where a purchaser buys a house, assumes the first mortgage and borrows funds from an institution, that are guaranteed by another asset, to assist in the purchase. He pointed out that the intention to borrow was self-evident. He noted that there were interest costs being paid on the debt. He submitted that the costs of the portion of the debenture used to pay off the second mortgage should be allowed as a legitimate financing cost.

The solicitor for the tenants submitted that there were not two separate identities involved here, as the landlord's agent had contended. He argued that once the corporate veil is pierced any distinction between the parent company and the subsidiary would disappear. The solicitor recognized that the costs would not be disallowed solely because the parties are not at arm's length. He pointed out that the Commission often uses a purpose test to assess the validity of the transaction. The solicitor argued that the purpose here was to take money out of the building.

The panel held that the fact that the two companies are not at arm's length does not mean that the cost will be automatically disallowed, although careful scrutiny of the transaction would be required. The appeal panel held that this debt extinguished an obligation under the option to purchase to assume the second mortgage because the landlord had already bought the mortgage. They felt the debt represented equity in the property. The panel noted that if this cost were allowed it would permit a parent company to purchase a building through a wholly owned subsidiary acting as the purchaser, and pass on any equity as a cost of debt financing to the tenants. The panel felt that this sort of transaction was highly inequitable to the tenants, and disallowed the costs of financing it.

In the result, the decision of Commissioner Browes was affirmed.

IN THE MATTER OF: Somerset Towers
2045-2055 Carling Avenue
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Levinson-Viner, in trust (landlord)

COMMISSIONER: D. H. Niblock

DATE: February 29, 1984

FILE NUMBER: 126-591-OT

ISSUES: Financing Costs - mortgage due for renewal at time of sale

Capital Costs - major expenditure after purchase

The landlord applied for whole building review pursuant to section 126 of the Residential Tenancies Act.

The landlord purchased the residential complex under review in June, 1983, near the end of Year 2. At the time of purchase the landlord assumed the existing first mortgage, renogotiated a second mortgage that replaced 3 existing mortgages, and arranged a vendor take-back mortgage. Commissioner Niblock found that financing costs had increased by $303,016 after purchase.

At the hearing, the agent for the landlord submitted that the new second mortgage had replaced 3 existing mortgages that were due for renewal in 1983, the year in which the building was purchased. He pointed out that it would have been necessary to negotiate a new mortgage in 1983 whether or not there had been a sale of the complex.

Commissioner Niblock agreed with the landlord's submission. In calculating the justified rent increase, the Commissioner treated only the costs arising out of the vendor take-back mortgage as increased financing costs due to purchase. The remaining financing costs were treated as costs that existed before purchase.

The landlord also claimed $480,457 as a capital cost for garage repairs. It was the tenant's position was that since the condition was known at the date of purchase, the cost of the repair should be considered part of the purchase price. The tenants relied on Guideline RR-3, which suggests that where a large expenditure is made soon after acquisition it should be considered part of the acquisition cost.

Commissioner Niblock disagreed with the opinion expressed in Guideline RR-3. He noted that if the approach suggested in the Guideline were followed the cost of the garage repairs would be considered as part of the acquisition costs. Since there is no mortgage that covers this capital expenditure and only actual costs of mortgages can be allowed, the cost would be considered as equity in the property. Commissioner Niblock pointed out that there is nothing in the legislation that allows for consideration of the landlord's equity in a residential complex. In the Commissioner's opinion, if major capital expenditures were considered as part of the purchase price, as suggested by Guideline RR-2, and financing costs were limited to 85% of the acquisition costs, as suggested in Guideline RR-3, the rents would never reflect the costs of capital expenditures made in the first year after purchase. Commissioner Niblock concluded that in view of these considerations, Guideline RR-2 should not be followed in this case. The garage repairs cost of $480,457 was allowed as a capital expenditure.

This order has been appealed by the tenants to an appeal panel of the Residential Tenancy Commission, but has yet to be heard.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 450 Daly Avenue
Ottawa, Ontario

AND IN THE MATTER OF an appeal by 450 Daly Apartments Limited, (landlord)

APPEAL PANEL: H. F. Snyder, R. S. Bentley, G. R. Tait

DATE OF DECISION: July 20, 1983

FILE NUMBER: 126-543-OT

ISSUES: Financing Costs - mortgage renewal, co-owner loans

The landlord brought an application for rent review under section 126 of the Residential Tenancies Act. The landlord appealed the decision of Commissioner Niblock on several grounds. Two points the landlord disagreed with were the disallowance of part of the increase in interest on renewal of the first mortgage, and the disallowance of the cost of loans advanced by co-owners.

In this review the accounting periods were: Year 1, calendar year 1980; Year 2, 1981; projected year, calendar year 1982.

The facts as found by the panel are as follows. The interest rate on the landlord's first mortgage was 9 3/4% until April 1980. At that time the landlord renewed it for one year at 14 1/2%. One year later it was renewed again at 15 1/2%. The panel also found that there was a series of private loans from co-owners totalling $303,830.88 that were being claimed by the landlord as additional financing.

At the initial hearing Commissioner Niblock allowed only the increase in interest costs from 14 1/2% to 15 1/2% on the first mortgage because that renewal had taken place in Year 2. Commissioner Niblock did not consider the advances from co-owners to be debt financing and only allowed them to the extent they were for capital items in the calculation under capital expenditures.

The appeal panel concurred with Commissioner Niblock on the first issue. They noted the increase from 9 3/4% to 14 1/2% had occurred prior to Year 2 and therefore should not be considered. If a landlord wants increased costs to be built into the rent an application for rent review should be made in the appropriate year. The scheme of the Act does not allow landlords to store up costs and then come to rent review. The panel felt that tenants should not be put in jeopardy for costs incurred in previous years.

The landlord argued that the costs of the co-owner loans should be allowed because they were used to offset cash shortfalls and to fund capital expenditures.

The panel members held that Commissioner Niblock was correct in not passing-through this cost. They viewed the co-owner loans as increased equity and not debt financing to be passed on to the tenants. The panel pointed out that where the funds had been advanced for capital expenditures, an allowance had been made in Commissioner Niblock's order for the cost of financing under capital expenditures. They held that to allow the financing cost of capital expenditures as an increased financing cost would be to give the landlord a double recovery.

The panel varied the order of Commissioner Niblock on other grounds.

• • • • • • • • • • • • • • •

IN THE MATTER OF: Centerpoint
101-201 Sherbourne Street
Toronto, Ontario

AND IN THE MATTER OF an application by the landlord, Thyme Properties Inc., for whole building review

COMMISSIONER: P. A. Browes

DATE: August 25, 1983

FILE NUMBER: 126-261-TO

ISSUES: Financing Costs - participation clause

The landlord filed an application pursuant to section 126 of the Residential Tenancies Act for whole building review.

The financing costs claimed by the landlord included payments made under a participation clause in the first mortgage. The clause required the landlord to pay 15% of his net income to the mortgagee. The net income was to be calculated by deducting the following allowable expenses from the gross income: taxes, heat, hydro, water, principal and interest payments on the first mortgage only, and a 16.5% allowance for other expenditures.

At the hearing, the landlord's solicitor submitted that participation payments should be passed through, as they constitute a portion of the full cost of borrowing. The tenant's representative argued that the payments represented a purchase of profits, in addition to a reasonable return received on the monies advanced.

Commissioner Browes referred to the previous order of Commissioner Myrhorod. He had noted that the cost was part of the profits calculated by a formula that ignored two other mortgages, which, when included, created a loss. He felt that participation payments based on a loss are meaningless and felt that it would be inappropriate to allow the cost in these circumstances.

Furthermore, he held that the payment amounted to a sharing of the profits rather than additional interest and was therefore not a legitimate cost for rent review purposes. Commissioner Browes fully concurred with the reasoning of Commissioner Myrhorod and disallowed the cost of the participation payments.

• • • • • • • • • • • • • • •

IN THE MATTER OF: 215 - 221 Gladstone Avenue
Ottawa, Ontario

AND IN THE MATTER OF an appeal by the landlord - Phidrex Holdings Ltd.

APPEAL PANEL: E. J. Pollock, P. A. Browes, G. I. Mandel

DATE OF DECISION: December 21, 1983

FILE NUMEER: A-2611

ISSUES: Guidelines - effective date of amendment after date of application

The landlord applied for rent review under section 126 of the Residential Tenancies Act. The landlord then appealed from the order of Commissioner Sandeman. One of the stated grounds of appeal was that the Commissioner erred in finding that a guideline amendment applied to an application dated prior to the effective date of the amendment.

The landlord's application for rent review was dated May 11, 1982. The Board of Commissioners had issued an amendment to Guideline RR-4 effective November 17, 1982. Under the amended guideline the suggested period for spreading financial loss was extended from 3 years to 5 years. Commissioner Sandeman noted that the guideline was applicable to this application because the hearing was after its effective date. However, he decided to spread the loss over 3 years instead of the 5 years suggested by the guideline.

Counsel for the landlord argued that the Commissioner erred in holding that the amendment was applicable. He argued that a change in the guideline is a change in the substantive law and it was incorrect for the Commission to apply the change in the substantive law retroactively.

The tenant's position was that since the date of the amendment preceded the hearing the amendment was properly applied.

In addressing the landlord's argument the appeal panel emphasized the distinction between guidelines and substantive law. Guidelines are not law enacted by the Legislature, but contain suggestions as to how the Residential Tenancies Act might be applied. The panel pointed out that the introductory section of the Guidelines emphasizes that they are intended to assist and not bind Commissioners in making decisions. The discretion of the Commissioners remains unfettered by the guidelines. The panel noted that a Commissioner might have the same view as that expressed in the guideline whether a guideline addresses the issue or not. The panel concluded that the effective date of a guideline is irrelevant and Commissioner Sandeman acted properly in deciding that the amendment could apply.

The order of Commissioner Sandeman was set aside on other grounds, and a new order was issued.

IN THE MATTER OF: Louise Apartments
118 Vaughan Road
Toronto, Ontario

AND IN THE MATTER OF an appeal by Quittler Ltd., agent for the landlord, J. L. Hornyak

APPEAL PANEL: G. E. Isaac, J. B. Jennings, D. L. Heller

DATE OF DECISION: March 14, 1984

FILE NUMBER: 126-903-ET

ISSUES: Jurisdiction - rent decrease justified

The landlord brought a section 126 application for rent review. At the hearing, Commissioner TenBroeck found that due to an excessive cost allowance at the previous rent review, no increase in the rent was justified. In fact, a rent decrease was warranted, a power not given to the Commission on a landlord's rent review application under the Residential Tenancies Act. Commissioner TenBroeck decided to order a token increase of $1 per unit per month in lieu of dismissing the application, which would have permitted the landlord to take a 6% increase.

The landlord appealed the order on several grounds; firstly, the Commission has no jurisdiction to order an increase less than 6%; secondly, Commissioner TenBroeck exceeded his jurisdiction in ordering a token $1 increase; and thirdly, the Commissioner erred in basing his decision on a consideration not ennumerated in section 131(1) of the Residential Tenancies Act.

In relation to the first issue, the landlord's solicitor argued that as a creature of statute the Commission can only exercise powers granted by its enabling legislation. She pointed out that under section 126 the landlord cannot apply for an increase less than 6%. Also, she argued, section 110(2) prohibits the Commission from making an order for less than 6%. To support this contention she cited several Nova Scotia cases in which courts have held that the Nova Scotia Rent Review Commission cannot order an increase less than the statutory 4%. On this basis she concluded that the only course of action open to Commissioner TenBroeck was to dismiss the application.

The tenant's representative argued that the Commission has the power to set and reduce rents based on the broad discretion given to it by the Residential Tenancies Act. As authority for this proposition, she cited Triassic Holdings Ltd. v. Muirhead et al., (1983) 40 O.R. (2d) 651, in which the Ontario Divisional Court recognized the discretion granted to the Commission under the Act.

The panel distinguished the Nova Scotia cases on the wording of the statutes. The Nova Scotia statute expressly prohibits an order for less than the statutory 4%. The panel pointed out that there is no similar limitation under the Ontario legislation. If the Ontario Legislature had intended that such a limitation exist it would have been clearly expressed in the statute. The panel stated that it is falacious to assume that rent increase on all section 126 applications are to be greater than 6%.

On the second issue, counsel for the landlord argued that when the Commissioner found a negative increase justified he should have dismissed the application. By ordering a token increase the Commissioner exceeded his jurisdiction, because there is no power given to the Commission to make an order for a rent increase other than one that has been justified by the findings.

The tenant's agent argued that the Commission has the power to order a negative increase but cited no authority for the proposition. He further argued that the Commissioner has no discretion in making a finding of fact, but has a discretion in applying the findings.

The panel agreed with Commissioner TenBroeck and the landlord's solicitor that the Commission does not have the power to order a decrease in rent on an application for rent review. The panel disagreed with the tenant's agent's suggestion that discretion can only be exercised in relation to the application of findings. They stated that it would be incongruous if a Commissioner could change a finding, once made, by his or her discretionary authority.

On the third issue the counsel for the landlord suggested that a rent review order must be based on only those considerations set out in section 131(1) of the Residential Tenancies Act. A decision based on any other consideration would be outside the jurisdiction of the Commission.

The agent for the tenants responded that the list in section 131(1) is not exhaustive, but serves as a guide.

The panel recognized that there is some degree of flexibility in section 131, but stated that the Commissioner was not to go beyond the considerations set out in that section. The appeal panel held that Commissioner TenBroeck erred in taking into account other matters, such as the effect of a dismissal on the rent increase available to the landlord. The panel noted that the tenants always have the power to dispute any increase under section 127.

The panel found there was no basis in law for the $1 increase, so the order of Commissioner TenBroeck was set aside, and the landlord's application dismissed.

NOTE:

The tenants have appealed this decision to the Divisional Court of the Supreme Court of Ontario.

* * * * * * * * * * * * * * *

IN THE MATTER OF: Summit Apartments
1170 Ramsey View Court
Sudbury, Ontario

AND IN THE MATTER OF an application for rent review by L. Kuczynski, in trust.

COMMISSIONER: G. R. Caverson

DATE: March 1, 1984

FILE NUMBER: 126-707-SD

ISSUES: "Justified" increase - whether based on increase in costs or total costs

The landlord filed an application for rent review under section 126 of the Residential Tenancies Act for rent review.

At the hearing the tenant's representative suggested that the Residential Tenancies Act required that the rent increase be determined by the gross operating, financing and capital costs, and not by an increase in those costs. She submitted that the word "justified" must be interpreted so that the result is consistent with the remedial nature and intent of the legislation. The legislation was not intended to give increases that protect some landlord's profit levels and restrict others to hardship allowances. She submitted that the Act should apply equally to all. She argued that the Residential Tenancy Commission's interpretation of section 131 is wrong in law. There is no direction given to the Commission under section 131 to base rent increases on increases in costs.

Commissioner Caverson referred to section 131(1)(a) which requires the Commission to make findings respecting costs that the landlord has experienced or will experience. He felt that these words clearly indicate that the costs of a prior period and the costs of a future period should be examined, and that obviously this would lead to an examination of the change in costs over the two periods. The Commissioner held, therefore, that a change in costs must be considered by the Commission when ordering a rent increase.

The landlord appealed to an appeal panel of the Residential Tenancy Commission on unrelated grounds. The appeal was dismissed and the order of Commissioner Caverson affirmed.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 1465 Lawrence Avenue West
North York, Ontario

AND IN THE MATTER OF an application by the landlord, Wican Corporation Limited and Gulava Holdings Limited

COMMISSIONER: David J. Burnside

DATE OF DECISION: January 6, 1984

FILE NUMBER: 126-787-NY

ISSUES: Loss of Service - supplier now charging landlord for service that was previously free

The landlord applied for a determination of the maximum rents that may be charged under section 126 of the Residential Tenancies Act.

For a number of years cable television had been provided at no charge to the landlord, who had passed this benefit on to the tenants at no extra charge. However, a new cable company had recently taken over and had discontinued free service to the building. The landlord decided that it did not want to continue providing the service to the tenants. It negotiated a special price with the cable company for those tenants that were interested.

At the hearing the tenants took the position that this constituted discontinuance of a service and that there should be a reduction in the justified rent increase as compensation.

The solicitor for the landlord argued that given the unique fact situation in this case, there was no loss of a service. The landlord had received a free service which it had passed on to the tenants, and now the supplier was charging for that service. The solicitor submitted that the landlord had two alternatives. The landlord could pay the cost itself and then pass the cost on to the tenants through higher rents, or the cost could be paid by the tenants directly to the cable company. The result in both situations would be the same.

Commissioner Burnside concurred with the solicitor's arguments. He stated that if the landlord had undertaken to pay for the service the cost would have been passed through at this review as part of the rent increase. The Commissioner felt that because the tenants were paying there had been a direct pass through of costs that was acceptable in the given fact situation.

No adjustment was made for loss of service or cable television costs in the order.

IN THE MATTER OF: Wedgewood Place
6061 Yonge Street
Willowdale, Ontario

AND IN THE MATTER OF an appeal brought by certain tenants

APPEAL PANEL: K. S. Sagoo, W. D. Biggar, N. L. Myrhorod

DATE OF DECISION: May 22, 1984

FILE NUMBER: A-3072

ISSUES: Notice of Rent Increase - effect of section 5 of Residential Complexes Financing Costs Restraint Act

The landlord brought a section 126 application for rent review. At the initial hearing Commissioner Smith ordered an increase of 7.93%. Certain tenants appealed on the ground that the Commissioner had erred in ordering the 7.93% increase in their rents when they had received notices of a rent increase of 6%.

On appeal the tenants argued that the notice for the 6% increase was binding on both the landlord and the tenants. They submitted that since they had not given the landlord a notice of termination, section 60 of the Residential Tenancies Act provided that they were deemed to have accepted the 6% increase. They felt that in view of this binding agreement between the landlord and tenants, the Commissioner had erred in ordering a larger increase.

The appeal panel referred to the Divisional Court of Ontario decision in Cando Property Management v. Wilson (1983), 44 O.R. (2d) 123. In that case the court held that a notice of rent increase is the equivalent of an "offer" in the law of contract. If the tenant accepts the increase either by confirmation, or deemed acceptance under section 60 of the Residential Tenancies Act, there has been both an offer and an acceptance. As a result both parties are bound to accept the increase.

The landlord's representative submitted that there were two ways to distinguish this case. Firstly, the case only deals with acceptance of an increase and not the specific amount of the increase. Secondly, the action in that case was commenced before the Residential Complexes Financing Costs Restraint Act (R.C.F.C.R.A.) came into force. He noted that under section 5 of that Act, section 131(4) of the Residential Tenancies Act, respecting equalization of rents, was suspended. Section 5 requires that the total rent increase shall be apportioned equally amongst all the units on a percentage basis, despite the amount of increase set out in the notice. The landlord's representative concluded that the Commissioner had no alternative but to award the 7.93% increase to the rent of all the units, including those that received the 6% notice.

The panel members concurred with the landlord's interpretation of section 5 of the R.C.F.C.R.A.. They held that Commissioner Smith had acted correctly in finding a 7.93% rent increase to be justified for all units despite notice given for a 6% increase.

The appeal panel varied the decision of Commissioner Smith on other grounds.

* * * * * * * * * * * * * * *

IN THE MATTER OF: Catalyst Gates
399 Markham Road
Scarborough, Ontario.

AND IN THE MATTER OF an appeal by certain tenants

APPEAL PANEL: G. E. Isaac, M. S. Green, L. C. LeDuc

DATE OF DECISION: October 26, 1983

FILE NUMBER: 126-280-SB

ISSUES: Operating Costs - court-appointed receiver's fees

The landlord brought application for rent review under section 126 of the Residential Tenancies Act. Certain tenants appealed the order on several grounds. One issue was whether a court-appointed receiver's fee should be accepted when an allowance for a 5% management fee had already been granted. Commissioner Harrott had allowed both costs at the initial hearing.

A court order dated May 29, 1978, on a motion by the plaintiff mortgagee, had appointed an interim receiver with the power to collect rents and pay expenses. The receiver's fees were to be a first charge on any rents collected. The receiver was to pay the landlord all rent received after deductions of operating costs on account of current mortgage payments or mortgage arrears.

The tenants' agent questioned whether this was a valid expense for rent review purposes.

The appeal panel considered that while the receiver must be paid, it would be excessive to allow both a 5% of revenue management fee and the receiver's fee. To allow both would be to allocate 10% of revenue for managing the property. In order to recognize that the receiver carries out functions that justify a management allowance greater than 5%, the panel allowed a further 1% to be passed through as the receiver's fee.

After ruling on a number of unrelated issues the panel set aside the order of Commissioner Harrott and substituted a new order.

IN THE MATTER OF: 60 Ruddington Drive
North York, Ontario

AND IN THE MATTER OF an appeal by the landlord - Shickedanz Brothers Limited, pursuant to section 126 of the Residential Tenancies Act

COMMISSIONER: David J. Burnside

DATE OF DECISION: February 24, 1984

FILE NUMBER: 126-849-NY

ISSUES: Operating Costs - cycles of high then low costs

The landlord brought an application for rent review pursuant to section 126 of the Residential Tenancies Act. The landlord had not been to rent review in either Year 1 or Year 2.

At the hearing, Commissioner Burnside noted that the landlord was claiming a high increase in operating costs for the projected year over Year 2 but that the projected year operating costs were still lower than they were in Year 1. He speculated that the projected operating costs were already built into the rent. The Commissioner noted that he could not carry out a cost correction to bring these costs more in line because the landlord had not been to rent review the year before.

Commissioner Burnside then referred to section 131(1)(a) of the Residential Tenancies Act which requires that the rent increase be justified by a finding of operating costs. He noted that while he was bound to make a finding of costs he also had some discretion, recognized by the Divisional Court in Triassic Holdings Limited v. Muirhead (1983), 40 O.R. (2d) 651, in allowing those costs. He pointed out that in exercising this discretion regard must be had to the real merits and justice of the case as required by section 93(1). Commissioner Burnside felt that he could not pass through the cost in full when the highest costs were in a year when the landlord was content to take a 6% increase. He stated that if the projected year increase were passed through it would be possible to bring section 126 applications in alternate years and continually increase the rent using the same level of costs.

In these circumstances Commissioner Burnside felt the best approach was to average the operating costs over three years to better establish the true cost. As a result there was no cost-pass-through. He hoped that there would be no cost correction on a subsequent application because it would undo what he had attempted to correct on this application, and would effectively be an appeal of the exercise of his discretion. In his opinion, cost correction was properly used only when there has been an error in the projection.

In the result the justified increase was calculated without an allowance for increased operating costs.

* * * * * * * * * * * * * * *

IN THE MATTER OF: 156 Bolton Street
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Annie Beaudoin (landlord)

COMMISSIONER: Jacques J. Menard

DATE: June 5, 1984

FILE NUMBER: 126-676-OT

ISSUES: Procedure - section 126 application filed to obtain a ruling on a secton 128 exemption

The landlord brought a section 126 application for rent review for the purpose of determining whether the unit was subject to a section 128 exemption due to extensive renovations. The landlord filed photographs of the interior and exterior in addition to a Cost Revenue Statement and supporting documentation.

Commissioner Menard referred to Guideline P-7, which provides for applications under section 126 for the purpose of obtaining a ruling as to whether the unit is exempt from rent review. The Commissioner pointed out that the exemptions referred to were those found in sections 4 and 134 of the Residential Tenancies Act. In his opinion there was a need for a similar

procedure to test the applicability of section 128. The Commissioner recognized that usually section 128 exemptions are challenged by tenants on section 127 and section 129 applications. He felt that this approach was unsatisfactory from the landlord's point of view because a long period of time may elapse before a tenant brings an application, or the building may be sold to an unsuspecting landlord. Commissioner Menard held that the present landlord's approach to the problem was prudent and could be accommodated on a section 126 application.

Commissioner Menard then examined the evidence presented at the hearing and found that the renovations were so substantial that a new unit was created which qualified for the section 128 exemption. The application was then dismissed due to lack of jurisdiction.

* * * * * * * * * * * * * * * *

IN THE MATTER OF: 1430 King Street West
Toronto, Ontario

AND IN THE MATTER OF an application by the landlord, King-Jameson Apartments Ltd., for a whole building review

COMMISSIONER: K. S. Sagoo

DATE: November 7, 1983

FILE NUMBER: 126-376-TO

ISSUES: Procedure - interpretation of "not later than 14 days"

The landlord brought an application for rent review under section 126 of the Residential Tenancies Act.

At the hearing the tenant's representative requested that Commissioner Sagoo dismiss the application because the landlord had not complied with section 126(4) of the Act. She submitted that in counting the 14 days required by that subsection the date of submission and the date of the hearing should not be included. She argued that, therefore, the landlord had failed to file the Cost Revenue Statement not later than 14 days before the date of the hearing.

The landlord's agent argued that the method of counting days is discretionary and that the date of submission of the materials and the date of the hearing should be included.

Commissioner Sagoo noted that there is no statutory definition of "not later than" but that at common law the words refer to "clear days". He held that the words were properly interpreted as meaning 14 clear days, and that therefore the landlord's application was filed out of time.

The agent for the landlord then requested that the Commissioner exercise his discretion to extend the time for filing, which the Commissioner refused to do.

The landlord's application was dismissed.

An appeal by the landlord from this decision was later dismissed and the order of Commissioner Sagoo affirmed.

* * * * * * * * * * * * * * *

IN THE MATTER OF: Apartment 6
114 Glebe Street
Ottawa, Ontario

AND IN THE MATTER OF an appeal by the landlord, Controlex Management Limited, and Susan Dent, in trust, and an appeal by the tenant, Peter L. Salvatori

APPEAL PANEL: G. E. Isaac, J. B. Jennings, P. A. Browes

DATE: March 7, 1984

FILE NUMBER: A-2677

ISSUES: Renovations - interpretation of section 128

The tenant brought an application under secton 129 of the Residential Tenancies Act for overpayment of the rent. Both the landlord and tenant appealed the order. The issue on appeal was the amount of rent that could be charged for Unit 6, 114 Glebe Street. The fact that the unit had been extensively renovated was not in issue.

At the initial hearing Commissioner LeDuc held that the landlord had an opportunity to set a new rent under section 128 of the Act, as interpreted by Guideline RR-9, because of the extensive renovations. This Guideline suggests that extensive renovations may effectively create a new unit. Accordingly, section 128 of the Act would permit the landlord to set a new rent without regard to the 6% limitation in section 125.

The tenant argued, on appeal, that in his opinion section 128 only applied to vacant or unoccupied units and not to renovate units. He pointed out that section 128 makes no reference to "renovations". He contended that the Commission's interpretation of the words "not rented in the previous 12 months" in Guideline RR-9 is contrary to the ordinary meaning of those words. The tenant suggested that it would be more in keeping with the spirit of the Act if the rent increase due to renovations were calculated on the cost of the improvement.

The appeal panel unanimously rejected the tenant's arguments. The panel held that the interpretation of section 128 given by Guideline RR-9 in relation to setting rents on renovated units is both fair and reasonable.

The decision of Commissioner LeDuc was wholly affirmed.

• • • • • • • • • • • • • • •

IN THE MATTER OF: 1320 Mary Street North
Oshawa, Ontario

AND IN THE MATTER OF an application for rent review by 488423 Ontario Limited (landlord)

COMMISSIONER: D. R. Snyder

DATE OF DECISION: July 11, 1983

FILE NUMBER: 126-539-PB

ISSUES: R.C.F.C.R.A. - interpretation of the word "made" in section 2

The landlord applied for review of the rents pursuant to section 126 of the Residential Tenancies Act.

At the hearing the agent for the landlord submitted that sections 1,2,3, and 4 of the Residential Complexes Financing Costs Restraint Act, (R.P.F.C.R.A.), should not apply to this application. Firstly, the building had not been purchased more than once since 1979. This was accepted by Commissioner Snider. Secondly, the application was "made" on October 28, 1982 when it was mailed to the Commission, even though it was not received by the Commission until November 2, 1982.

Commissioner Snider referred to section 2 of the Residential Complexes Financing Costs Restraint Act, which states "where an application is made on or before the 31st day of October 1982..." The issue was how the word "made" should be interpreted. The Commissioner felt that two possible meenings could be adopted. An application could be made at the time it was signed and mailed, or, at the time it was received. Commissioner Snider referred to section 99(2) of the Residential Complexes Financing Costs Restraint Act, which suggested that where notice or a document is given by mail it is deemed received 5 days later. He pointed out that the word "given" in that subsection 2 refers to subsection 1 which deals with giving of notice and documents to persons who are parties. As the Commission is not a party, nor is it ever referred to as a person, the Commissioner held that section 99 did not apply to applications made to the Residential Tenancy Commission.

In his opinion an application is made at the time it is completed signed and mailed. At that moment there is nothing more the landlord can do. He also noted that there was a possibility the application would have been received on time if October 30th and 31st had not fallen on the weekend. Commissioner Snider concluded that the real merits and justice of the case required that the application be considered made as of the date of mailing. Therefore, section 1 through 4 of the Residential Complexes Financing Costs Restraint Act, were inapplicable to this application.

IN THE MATTER OF: 51 Powell Avenue
South Porcupine, Ontario

AND IN THE MATTER OF an application for rent review by Mario Boetto (landlord)

COMMISSIONER: S. J. Gillespie

DATE: July 15, 1983

FILE NUMBER: 126-513-TM

ISSUES: Revenue: deemed rent on landlord occupied unit
Justified Increase: application to newly rented unit

The landlord of a 2-unit duplex brought an application for rent review pursuant to section 126 of the Residential Tenancies Act. The downstairs unit had been occupied by the landlord for many years and was rented for the first time, at the beginning of the projected year. The landlord had exercised his right under section 128 of the Act to set the rent of $400 per month. That section states that where a unit has not been rented during the previous 12-month period the rent then charged shall form the basis for determining subsequent rent increases.

Commissioner Gillespie noted that when considering an application for rent review a revenue for Year 2 must be calculated. In this case, it was necessary to approve at a deemed revenue for the landlord occupied unit for Year 2. It was the Comissioner's opinion that if the present monthly rent of $400 were used to calculate the revenue the result would be unreasonable, since no rent had been collected for that unit in Year 2. She decided that the portion of the income that unit could have produced should be based on its percentage of the total assessed value of the property. Since the unit was assessed at 51% of the total value, Commissioner Gillespie considered that it would be reasonable to hold that it could have produced 51% of the revenue. On this basis she calculated that the unit produced a deemed Year 2 revenue of $145 per month.

After calculating increased costs, the Commissioner calculated a justified increase of 46 1/2%.

Commissioner Gillespie noted that under section 5 of the Residential Complexes Financing Costs Restraint Act she was required to apply the rent increase equally to all units on a percentage basis. The Residential Tenancies Act states in section 128 that a new rent set under that section shall form the basis for future rent increases. Commissioner Gillespie felt that it would be unreasonable to order a 46 1/2% increase on the $400 rent of the downstairs unit partially because the unit was first rented after the landlord applied for rent review. She noted that capital expenditures and increased costs would already be built into the $400 figure.

It was Commissioner Gillespie's opinion tht if she were to order a 46 1/2% increase on the deemed rent used to calculate revenue, she would be interfering with the landlord's right to set a new rent under section 128. She concluded that the Residential Complexes Financing Costs Restraint Act was not intended to interfrere with section 128 and therefore she could order different rents for the two units.

In the result a 46 1/2% increase was applied to the rent of the upstairs unit, the rent on the downstairs unit was ordered to remain at $400.

* * * * * * * * * * * * * * * *

IN THE MATTER OF: Southwest One
577, 587, 597, 607 Cranbrook Road
London, Ontario

AND IN THE MATTER OF an application under section 126 of the Residential Tenancies Act by Barry Parker for Sifton Properties Limited (landlord)

COMMISSIONER: D. C. MacDonald

DATE OF DECISION: July 12, 1983

FILE NUMBER: 126-655-LN

ISSUES: Revenue Costs - apportioning between exempt and non-exempt

The landlord applied under section 126 of the Residential Tenancies Act for a determination of the rents that may be charged for this 94 unit residential complex.

The complex under review contained approximately 20 units with rents over $750, which were therefore exempt from rent review under section 134(1)(e). Commissioner MacDonald noted that he could conduct a rent review of the remainder of the building by considering only the revenue produced and the costs incurred by the units subject to rent review. He also noted, on the other hand, that the exempt units were the larger units which produced proportionally larger costs and revenues. He therefore decided that the fairest approach would be to include all the costs and revenues, and apply the increase only to the units subject to rent review. Commissioner MacDonald felt that this approach would not alter the final result.

Commissioner MacDonald calculated the justified increase based on all costs and revenues and then applied that increase to the non-exempt units only.

* * * * * * * * * * * * * * * *

IN THE MATTER OF: Willroy Apartments
Blocks 2 and 3
Manitouwadge, Ontario

AND IN THE MATTER OF an application for rent review filed by Willroy Mines Ltd., landlord

COMMISSIONER: S. J. Gillespie

DATE OF DECISION: March 1, 1984

FILE NUMBER: 126-246-TB-83/84

ISSUES: Revenue - vacancies caused by eviction

The landlord brought an application pursuant section 126 of the Residential Tenancies Act for rent review.

The complex under review consists of two buildings built to provide accommodation for mine employees. After the mine closed in 1976, the landlord started to rent to other tenants. Subsequently, the landlord tried to

sell the buildings with vacant possession, but did not succeed in evicting all the tenants. The buildings were not sold when the new mine opened, so the landlord decided to renovate and rent the units to mine employees. The landlord then brought this application for rent review.

At the hearing, counsel for the landlord argued that the actual vacancy rate should be considered when calculating the revenue produced, and the resulting loss be passed on in the form of increased rents. He suggested that the landlord would not have suffered this loss if it had been able to sell the complex with vacant possession. By refusing to move the tenants had frustrated this intention, creating the loss, and therefore the tenants should cover this cost.

Counsel for the tenants stated that the total potential revenue should be considered, with a reasonable allowance for vacancies. She argued that the landlord had made a deliberate attempt to create the vacancies and that they were not the result of normal operating circumstances.

Commissioner Gillespie found that the revenue claimed by the landlord was not revenue produced by a complex operating on an ongoing basis. She recognized that the tenants played an important role in preventing the complex from closing down, but that it was their legal right to retain possession. She felt that to allow the loss created in these circumstances would be unreasonable. Commissioner Gillespie then referred to Guideline RR-4 which discusses the need to consider ordinary circumstances in allowing a financial loss. She held that the allowance for vacancies is intended to protect the landlord from the vagaries of the rental market that are beyond its control. The allowance was not intended to protect a landlord from the results of its own management decisions. Commissioner Gillespie concluded that these were not vacancies within the intent of the rent review process.

In the result, the Commissioner considered the total potential revenue in calculating the justified increase.

IN THE MATTER OF:	Townhouse 110 740 Kennedy Road Scarborough, Ontario
BETWEEN:	Mr. and Mrs. Frank Wood (tenants) - and - Donlee Holdings Limited (landlord)
APPEAL PANEL:	E. J. Pollock, N. L. Myrhorod, R. S. Bentley
DATE:	January 12, 1984
FILE NUMBER:	A-2642
ISSUES:	Separate Charge - new service

The tenants applied under section 129, for a repayment of rents charged in excess of the amount permitted by the Residential Tenancies Act. Commissioner Harrott dismissed the application because he found that the landlord had taken no illegal rent increases. The tenants appealed the order on the ground that the separate charge for the new service constituted an illegal rent increase.

It was found by the panel at the hearing that when the tenants took possession an agreement was reached in which the landlord would provide them with a washing machine for an extra $30 per month. This service was not available to the previous tenant, or to any other tenants in the complex.

Counsel for the tenants argued that the landlord did not have the authority to impose the extra charge because there was no order from the Residential Tenancy Commission permitting it to do so. She referred to the Divisional Court decision in 501 Kingston Road Ltd., v. Ferguson et al., (1980) 27 O.R. (2d) 799 as authority for this proposition. That case arose out of a very similar fact situation, in which a new spearate charge was introduced for carpets. The Divisional Court held that the charge was part of the rent, as defined in section 1(n) of Residential Premises Rent Review Act, 1975, and that it constituted an illegal rent increase because it was not authorized under that Act.

The solicitor for the landlord submitted that the lease included an agreement between the landlord and the tenant to supply a unique service. He referred to Guideline RR-15 which states that one of the fundamental principles of the law of contract is that the terms of the agreement cannot be altered by one party unilaterally. It was his contention that the tenant was trying to alter the terms of the agreement unilaterally by bringing this application.

The appeal panel held that 501 Kingston Road Ltd., v. Ferguson et. al. raises the same issues as this appeal. The panel decided to follow the reasoning of that case and held that the separate charge for the washing machine constituted an unauthorized rent increase.

The panel set aside the order of Commissioner Harrott and ordered a rent rebate.

The landlord has appealed this order to the Divisional Court, of the Supreme Court of Ontario, on the ground that the Commission erred in law in holding that the provision of a new service was within the definition of rent.

* * * * * * * * * * * * * * *

IN THE MATTER OF: Woburn Village
2055 Ellesmere Road
255 & 155 Dolly Varten Blvd. &
550 Brimorton Drive
Scarborough, Ontario

AND IN THE MATTER OF an application for rent review by 465251 Ontario Limited (landlord)

COMMISSIONER: C. E. Harrott

DATE: June 30, 1983

FILE NUMBER: 126-347-SB

ISSUES: Standard of Maintenance - missing appliances in some units, section 5(a) R.C.F.C.R.A.

The landlord brought an application for rent review pursuant to section 126 of the Residential Tenancies Act.

At the hearing the tenants' representative submitted that there had been a decrease in the standard of maintenance since many units in the complex were missing appliances. He stated that the leases required that the landlord provide these appliances, and also that the costs of these appliances were built into the last rent review order.

Commissioner Harrott noted that section 5(a) of the Residential Complexes Financing Costs Restraint Act requires that the Commission allocate the justified rent increase equally among all the units in the complex on a percentage basis. This section precludes any adjustment to the rents of individual units. A reduction would have to be given to all the units in the complex. In the Commissioner's opinion, if the rents were reduced by the cost of the missing appliances, the tenants would lose their legal rights to apply to County Court for an abatement of the rent under the Landlord and Tenant Act.

Commissioner Harrott found that there had been a decrease in the standard of maintenance, but that he would make no adjustment for it in the new rents. He suggested that the best course of action available to the tenants was to bring an application for rent abatement under the Landlord and Tenant Act.

• • • • • • • • • • • • • • •

IN THE MATTER OF: 820 Maitland Avenue
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Dino Bucciarelli and Maria Bucciarelli (Landlord)

COMMISSIONER: Jacques J. Menard

DATE: December 8, 1983

FILE NUMBER: 126-473-OT

ISSUES: Whole Building Review - whether semi-detached houses are separate residential complexes

The landlord made an application for rent review of one-half of a horizontal duplex, or semi-detached house, pursuant to section 126 of the Residential Tenancies Act.

The preliminary issue to be resolved was whether this application fulfilled the section 126(2) requirement that an application be filed for all units in the residential complex.

At the hearing Commissioner Menard made the finding that while the two semi-detached houses share a common wall, tax assessment and legal title, they have separate municipal addresses and costs of maintenance are billed to each individually. He also noted that extensive upgrading had been carried out in one unit only. He emphasized that each house could exist independently if the other were demolished, and also that the two could be legally severed.

Commissioner Menard noted that section 93 of the Residential Tenancies Act gives him the discretion to consider the pattern of activities relating to the complex. He stated that the pattern of activities, in this case, clearly showed that the two houses were treated as separate complexes.

Commissioner Menard held that for the purposes of rent review the semi-detached house in question should be considered as a separate residential complex. He emphasized that the unit's capability of independent physical existence and the clear separation of costs were important factors in this decision.

IN THE MATTER OF: 140 Carlton Street
Toronto, Ontario

AND IN THE MATTER OF an application for whole building review by the landlord, Carlton Properties

COMMISSIONER: K. S. Sagoo

DATE: October 18, 1983

FILE NUMBER: 126-461-TO

ISSUES: Withdrawal of Application - considerations

The landlord brought an application for whole building review pursuant to section 126 of the Residential Tenancies Act. Several months later the landlord requested permission to withdraw. The hearing was held in order to consider whether consent to withdraw should be granted.

At the commencement of the hearing the landlord's agent stated that the landlord no longer wished to withdraw the application. He suggested the hearing be rescheduled so the application for rent review could be fully examined. The agent suggested that this course of action would not be prejudicial to the tenants, rather, if the application were not proceeded with, the only prejudice would be to the landlord, through not allowing him to justify the proposed increase.

The tenants stated that they were absolutely unprepared for this request. They had attended to support the withdrawal of the application. The tenants pointed out that they were under the impression that the hearing was a mere formality and consent was a foregone conclusion. As a result no legal counsel was retained nor did many tenants attend. The tenants argued that if an adjournment was granted in order to permit a full hearing it would cause hardship to many tenants who would owe back rent for almost one year.

Commissioner Sagoo stated that several factors should be carefully considered before consent to withdraw is given. He queried whether it would be in the public interest to allow a withdrawal, which permits an increase of 6%. The Commissioner felt that a 6% increase would not adversely affect

subsequent tenants. He then considered whether there would be prejudice to the parties, especially where other proceedings may be required, due to the withdrawal, such as rent rebates under section 129, and disputes of increases under section 127. He felt that there would be no prejudice to the tenants on this point, and that any prejudice to the landlord arose out of his own actions. This was something that the landlord should have considered when the decision was made to withdraw. What would be the effect on the tenants of further delaying an already long and drawn-out process? It was noted that a retroactive increase granted such a long time after the first effective date of the rent increase can create undue hardhsip for many tenants. Finally Commissioner Sagoo considered the rules of natural justice. He held that it was a breach of faith on the part of the landlord to change his mind at the last minute, when he had effectively decided to abandon the application. Commissioner Sagoo felt that the landlord's actions amounted to an abuse of process.

Commissioner Sagoo determined that in light of the above considerations the Commission should permit the withdrawal of this application.